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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Joint Application by SBC Communications, Inc.,  
Southwestern Bell Telephone Company, and  
Southwestern Bell Communications Services, Inc.  
d/b/a Southwestern Bell Long Distance for  
Provision of In-Region, InterLATA Services in  
Kansas and Oklahoma

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 00-217

REPLY COMMENTS OF  
McLEODUSA TELECOMMUNICATIONS SERVICES, INC. AND  
CAPROCK COMMUNICATIONS CORP.

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## **SUMMARY**

As discussed in the initial comments of McLeodUSA and Caprock, SBC provides little performance data specific to Kansas and Oklahoma to support its section 271 application. The data it does provide reveal systemic discrimination against CLECs, contradicting any claims that SBC has irreversibly opened local markets to competition.

The record developed in the state proceedings and the comments of other parties in opposition to the instant application confirm the points of McLeodUSA and CapRock and raise additional, serious concerns, including SBC's failure to provide UNEs at cost-based rates. The Commission should accord little weight to the recommendations of the Oklahoma and Kansas commissions because they are based in significant part on promises of future performance or lacking in persuasive findings of compliance with the 14-point competitive checklist.

The Evaluation of the Department of Justice also affirms McLeodUSA and CapRock's belief that SBC has not provided sufficient evidence to demonstrate nondiscriminatory access to OSS in Oklahoma and Kansas. Notwithstanding SBC's OSS claims to the contrary, the record indicates that the Kansas and Oklahoma OSS are not the same as what the Commission approved in Texas. Moreover, even if it is the same system, CapRock's experience with the Texas OSS suggests that SBC offers substandard performance to CLECs generally.

The Commission should deny SBC's application for its failure to demonstrate compliance with the competitive checklist.

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d/b/a Southwestern Bell Long Distance for	)	
Provision of In-Region, InterLATA Services in	)	
Kansas and Oklahoma	)	

**REPLY COMMENTS OF  
McLEODUSA TLECOMMUNICATIONS SERVICES, INC. AND  
CAPROCK COMMUNICATIONS CORP.**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") and CapRock Communications Corp. ("CapRock") submit these reply comments in the above-captioned Joint application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc.d/b/a Southwestern Bell Long Distance ("SBC") for Provision of In-Region, InterLATA Services in Kansas and Oklahoma filed October 26, 2000 ("Application")<sup>1</sup> and urge the Commission to deny the Application.

**I. STATE RECOMMENDATIONS SHOULD BE ACCORDED LITTLE WEIGHT**

The recommendations of the state commissions in this proceeding, particularly the Kansas Corporation Commission ("KCC"), appear to be premised in significant respects on promises by SBC of future adequate performance and for that reason do not provide any basis to

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<sup>1</sup> Comments Requested on the Application By SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Kansas and Oklahoma, Public Notice, CC Docket No. 00-217, DA 00-2414, released October 26, 2000. McLeodUSA and CapRock submitted initial comments on November 15, 2000.

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grant the application. The report of the KCC is clearly based almost entirely upon its hopes that SBC will not renege on its promises in the future to comply with the Act, rather than demonstrations of current performance, and the KCC's intent to closely monitor SBC. Thus, the KCC states:

The Commission again stresses that its endorsement of SWBT's application is based on an expectation SWBT will fulfill the commitments it has made to this Commission and to the competitive LECs and that SWBT will cooperate with Staff in efforts to improve the performance remedy plan. The Commission anticipates that these commitments will be met and expects Staff to apprise it of any progress made addressing these concerns.<sup>2</sup>

While McLeodUSA and CapRock are pleased that the KCC has indicated an intention to adopt an expedited dispute resolution process,<sup>3</sup> the FCC may not grant a section 271 application based upon promises of future performance and the hope that things will work out. The Commission must insist upon an application that fully demonstrates that the local exchange market is "irretrievably" open at the time of the application.

The KCC seems to have decided to defer determination of whether SBC is complying with some aspects of the Commission's rules to later proceedings. It stated that "[t]his Commission still must decide important collocation issues, such as the ability of competitive

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<sup>2</sup> Report of the State Corporation Commission of the State of Kansas on Southwestern Bell Telephone Company's Compliance with Section 271, CC Docket No. 00-217 (filed Nov. 20, 2000) ("KCC Report").

<sup>3</sup> Unfortunately, like many of the other KCC proceedings relevant to this section 271 application, the Commission has not concluded the proceeding. In fact, the docket was only opened on October 24, 2000. Although the KCC indicated in its Report filed November 20, 2000 that it "will adopt" the "proposed process" pending the outcome of this proceeding, it is not clear that it has in fact adopted the procedures, even on an interim basis.

LECs to collocate at remote terminals.”<sup>4</sup> Thus, the KCC has not completed work on critical issues, which completely undercuts any basis for reliance on its recommendation that SBC is complying with this Commission’s collocation rules.

In other areas, the KCC appears to make a finding of present compliance with a checklist item but expresses grave doubts as to whether it is correct. For example, the KCC concludes that SWBT has satisfied checklist item 2, but states it is “concerned with SWBT’s performance [in the provisioning of xDSL] and will continue to monitor it closely.” In addition, its conclusion that SWBT complies with checklist item 2 “relies heavily on this Commission’s ability to modify the performance measures and penalties, if necessary, to assure that SWBT continues to improve its performance in this area.”<sup>5</sup> There are also numerous instances in which the KCC instructs the staff to pay close attention to SBC’s performance measurement data to ensure compliance improves and that no backsliding occurs.”<sup>6</sup>

Similarly, the Oklahoma Corporation Commission’s (“OCC”) support of the instant application can be characterized as less than a persuasive endorsement. The OCC offers only a brief letter in this docket, combined with a record that has been roundly criticized in the initial comments by carriers opposed to SBC’s application, such as Cox Communications. Significantly, the OCC does not address the substantial issues raised concerning the lawfulness

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<sup>4</sup> See KCC Report at 9.

<sup>5</sup> KCC Report at 21. IP Communications comments argue that the KCC “failed to properly apply the burden of proof” with respect to DSL loops and line sharing and that the Commission relied on the Kansas staff recommendation that stated staff’s belief that there would be good performance once volumes picked up.” IP Communications at 4.

<sup>6</sup> KCC Report at 28.

of the UNE and interconnection rates or SBC's poor performance on a multitude of performance measures, as explained more fully below.

The Commission has stated that because the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B), "the commission has discretion in each section 271 proceeding to determine the amount of weight to accord the state commission's verification."<sup>7</sup> Where, as here, the KCC's recommendation is based in part upon promises made by SWBT and can be viewed as "lukewarm at best," the Commission should not substantially rely on the state commission's analysis of whether SWBT has complied with the 14-point checklist. As the Commission well knows, RBOC financial incentives to open markets completely disappears once section 271 authority has been granted.<sup>8</sup> The Commission must insist that a 271 application fully demonstrate that local exchange markets are irreversibly opened to competition.<sup>9</sup> Thus, the Commission should critically review and discount the recommendations of the Kansas and Oklahoma commissions when evaluating SBC's application.

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<sup>7</sup> *Texas 271 Order* at para. 11.

<sup>8</sup> As experience in New York thus far suggests, more rigorous application of the competitive checklist may deter significant backsliding later.

<sup>9</sup> The Commission has stated many times that an applicant must show an ability at the time of the filing of the application to satisfy the various requirements of section 271. For example in the Texas 271 proceeding the Commission stated:

the Commission has found that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. *Texas 271* at para. 38; *see also New York Order*, 15 FCC Rcd at 3969.

## **II. INITIAL COMMENTS CONFIRM THAT THE MINIMAL PERFORMANCE DATA PREVENTS MEANINGFUL EVALUATION OF SBC'S APPLICATION**

As discussed, the conclusions of the KCC should be accorded little weight in this proceeding. Despite its flaws, the KCC recommendation is instructive in noting that the minimal level of competition in Kansas, and the consequent lack of performance data, makes it difficult to adequately evaluate the SBC applications. For example, the KCC states that there has been low activity in the provisioning of xDSL, and that "at this time the competitive LEC activity in Kansas [relating to the provision of xDSL services] is so limited its usefulness [in analyzing the provisioning of xDSL loops and line sharing] is unknown."<sup>10</sup> With respect to other performance measures, the KCC notes that for many of the measurements, no data was reported.<sup>11</sup> PM 10.2 and PM 11.2, relating to jeopardy notices, and several of the performance measures relating to 911 and E911 access, are examples of such missing measurements. Sprint observes that SBC offers region-wide data in many instances to cover the lack of data.<sup>12</sup> However, region-wide data is insufficient to demonstrate compliance with the competitive checklist in the individual states of either Kansas or Oklahoma. These conclusions, regarding the lack of information on basic and important performance measures, are completely consistent with initial comments and show that the application should be denied, not granted.

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<sup>10</sup> KCC Report at 17, 26.

<sup>11</sup> *Id* at 8.

<sup>12</sup> *See* Sprint Comments at 49.



As discussed below, the DOJ points out that the limited extent to which competitive carriers provide local exchange service in Kansas and Oklahoma.<sup>13</sup> This minimal level of competition generates minimal performance data by which to evaluate SBC's application, suggesting that these markets are not open to competition. Accordingly, McLeodUSA and CapRock submit that, to the extent the Commission doubts whether the application should be denied for the reasons raised in the initial comments, it should err on the side of denial given the dearth of information in the record, which precludes a reasoned basis for evaluation.

### **III. THE RECORD SHOWS THAT SBC HAS FAILED TO DEMONSTRATE ADEQUATE PROVISIONING PERFORMANCE TO CLECS**

The initial comments of McLeodUSA and CapRock and others demonstrate that SBC's performance measurements reflect substandard and/or discriminatory wholesale services provided to CLECs in Oklahoma and Kansas.<sup>14</sup> CLECs detail problems with both the coordinated hot-cut (CHC) process and the frame due time (FDT) process in Kansas.<sup>15</sup> In particular, one CLEC demonstrates how SBC's CHC processes contribute to the high incidence of missed appointments and explain the seemingly high success rates of SBC's firm order confirmations (FOC).<sup>16</sup> Upon receipt of a CLEC cut-over request, SBC will return a firm order confirmation without actually verifying whether facilities are available to perform the work later. SBC only checks the availability of facilities the day before the scheduled performance of the

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<sup>13</sup> Evaluation of the Department of Justice at 2 ("DOJ Evaluation").

<sup>14</sup> *See, e.g.*, Comments of AT&T at 24-28; Comments of IP Communications Corp. at 10-28; Comments of Sprint at 45-53; Comments of WorldCom at 17-22.

<sup>15</sup> *See* Allegiance Comments at 22; KMC Comments at 5-8; McLeodUSA and CapRock Comments at 22.

cut-over. In the meantime, the CLECs have relied upon the FOC to notify their customers when service is scheduled to be cut-over. The verification of facilities so late in the process inevitably leads to eleventh-hour postponements or missed appointments, resulting in frustrated customers who can be left without service when work like switch translations precedes the scheduled cut-over. Out of concern of causing harm to its customer-carrier relationship, these unreliable FOCs can compel a CLEC to “voluntarily” push-back work dates, which do not count against SBC as missed due dates and skew the performance data.

As detailed in McLeodUSA and CapRock’s initial comments, the performance results for loop provisioning, quality, maintenance and repair suggest that CLECs are being denied a meaningful opportunity to compete in Kansas and Oklahoma. Measurement after measurement, regardless of the loop-type, demonstrates that SBC has difficulty with firm order confirmation, causes missed work appointments, fails to provide facilities, and is otherwise providing CLECs with substandard performance.<sup>17</sup> SBC’s failure to meet performance criteria should be particularly troubling in the light of the absence of the inadequate level of performance data presented. Accordingly, the Commission should deny the application because SBC has not shown adequate or nondiscriminatory provisioning of essential services and facilities to CLECs.

#### **IV. INITIAL COMMENTS AFFIRM THAT SBC DISCRIMINATES IN PROVISION OF OSS**

In initial comments, McLeodUSA and CapRock alluded to the fact that over a majority of OSS-related performance measures, SBC has not produced sufficient data to establish its ability

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<sup>16</sup> KMC Comments at 5-8

<sup>17</sup> See McLeodUSA and CapRock Comments at 7-24.

to adequately process CLEC orders for UNEs.<sup>18</sup> For those measures where there is sufficient data to establish a measurement of performance, SBC fails to prove that it provides nondiscriminatory access to its OSS in Kansas and Oklahoma. Rather, SBC claims essentially that because the OSS used in Oklahoma and Kansas are purportedly the same as the OSS that was approved already in Texas, the FCC should grant the instant section 271 application.

The Commission should reject SBC's premise that its performance in Texas warrants approval for Kansas and Oklahoma. First, as the DOJ Evaluation points out, it is unclear whether the OSS used in Texas, which the Commission already approved, is the same as the OSS used in Kansas and Oklahoma. Notwithstanding some undefined degree of similarity, DOJ states that SBC has failed to demonstrate that the systems and processes used in Kansas and Oklahoma OSS are the same. For instance, SBC does not offer evidence regarding the means by which it ensures that the work necessarily performed at the state level, and not at the regional level---such as the management, staffing and training of personnel involved in performing the actual provisioning, maintenance and repair of CLEC orders--will be done in the same manner as in Texas.<sup>19</sup> "Evidence that *some* systems or processes are the same in multiple states is not sufficient to establish that *all* relevant systems and processes are the same, and evidence that a particular system is the same in many respects is not sufficient to establish that it is the same in all respects that may be relevant to a BOC's wholesale performance."<sup>20</sup> Thus, DOJ correctly

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<sup>18</sup> See McLeodUSA and CapRock Comments at 11-13.

<sup>19</sup> DOJ Evaluation at 32-33. Also, DOJ notes out the product offerings, ordering interface and codes, business rules, tend to differ on a state level. *Id.* at 32-34. SBC does not explain what impact on CLECs the fact that the server used to process orders for Texas is different than the one used in Kansas and Oklahoma.

<sup>20</sup> DOJ Evaluation at 36 (emphasis in original).

concludes that SBC has not submitted sufficient evidence to prove nondiscriminatory access to the OSS relied on by CLECs in Kansas and Oklahoma and that the Commission should require SBC provide clear and detailed evidence concerning the adequacy of OSS in Kansas and Oklahoma before granting SBC's application.

Moreover, Sprint shows that SBC's use of manual processing of most CLEC orders is much greater in [Oklahoma and Kansas] than it was for Texas.<sup>21</sup> The high percentage of manual orders for both resale and UNEs precludes reliance on the Texas data since the electronic process is much more dependable. As a state staff report indicates, it is highly unlikely that CLECs who are compelled to use manual processing methods have access to OSS that is comparable to SBC's retail operations when 85% of CLEC access is through "slow and error prone manual process."<sup>22</sup> Thus, Texas data or region-wide data does not appropriately reflect the "error-prone" outcomes likely to result from the manual processing used in Oklahoma and Kansas. Accordingly, the Commission should find on the present record that SBC has not shown that it provides nondiscriminatory access to OSS in Kansas and Oklahoma.

CapRock's experience in Texas shows that even if SBC used the same OSS in Oklahoma and Kansas as it does in Texas, SBC's instant application would still be deficient. In their initial comments, McLeodUSA and CapRock documented SBC's OSS performance decline, lack of scalability, and inoperability of SBC's "back end" systems associated with OSS.<sup>23</sup> These are

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<sup>21</sup> Sprint Comments at 52.

<sup>22</sup> Sprint Comments at 52-53 (internal citation of KCC staff report omitted.)

<sup>23</sup> McLeodUSA and CapRock Comments at 29-33.

critical problems that have strained customer-carrier relationships, increased labor-costs, and resulted in service outages. If, as SBC attests, it uses the same OSS region-wide, such deficiencies are attributable to Oklahoma and Kansas and reflect a systemic failure of SBC to provide nondiscriminatory access to CLEC's to this critical wholesale function. Thus, the poor performance of the OSS SBC uses in Texas, even if it were the same as its Kansas and Oklahoma OSS, warrants denial of the instant section 271 application.

**V. FAILURE TO DEMONSTRATE UNE RATES COMPLY WITH TELRIC IS GROUNDS FOR DENIAL OF SBC'S APPLICATION**

Several initial comments observe that SBC's recurring and nonrecurring charges UNEs in Oklahoma and Kansas are substantially higher than those in Texas that the Commission has found to be appropriately cost-based. In addition, the recurring charges in Oklahoma typically are also substantially higher than those in Kansas. AT&T questions the basis for that difference, noting that in Oklahoma and Kansas virtually the same cost information was submitted to each of the commissions and that there are very similar geographies, yet the two states arrived at disparate recurring rates.<sup>24</sup>

Although differences in charges between two states does not definitively by itself show that one or both charges do not comply with TELRIC, a large unexplained difference raises a substantial question as to the legality of the unexamined rates. As the Commission has recognized there can be valid variations based upon different, perfectly acceptable assumptions adopted in each state or upon different circumstances (*e.g.* different geographies or wage rates<sup>25</sup>),

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<sup>24</sup> AT&T Comments at 7.

<sup>25</sup> *Michigan 271 Order*, 12 FCC Rcd 20543, 20699 (1997).

but large unexplained differences raise an issue of whether one or both sets of rates comply with TELRIC.

The Department of Justice states that because of the large difference between the interconnection and UNE prices in Oklahoma and Kansas compared to Texas “the Commission should undertake an independent determination whether the [prices in Oklahoma and Kansas] conform to the requirements of the 1996 Act and the Commission’s rules.”<sup>26</sup> Thus, under the competitive checklist the Commission must make an independent determination whether the prices conform to the requirements of the Act and the Commission’s rules.<sup>27</sup> If the Commission is unable to make a finding that the rates in Oklahoma or Kansas satisfy the 1996 Act or the Commission’s rules, the Commission must reject one or both applications.

In this regard, McLeodUSA and CapRock submit that the Commission will be unable to make a determination that the rates are TELRIC-based because there is no cost or other information in the record that would explain the higher rates in Oklahoma and Kansas than in Texas. As AT&T noted in its comments, virtually the same cost and other information was submitted in both Oklahoma and Kansas and there are very similar geographic factors, yet the two state commissions came up with very different recurring rates. SBC has not presented any evidence that the differences in prices accurately reflect any underlying differences in costs.

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<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> The Commission has restated its responsibility to be the final arbiter as to whether an applicant has satisfied the 14-point checklist, and specifically, whether an RBOC is providing interconnection and UNEs at TELRIC prices. *See Michigan 271 Order* at 20698. The Commission has confirmed that a state warrant deference when it determines prices of UNEs and interconnection (FCC New York Order at para. 224), but ultimately, it is the Commission that has a statutory duty to ascertain whether the state prices are consistent with the 1996 Act. 47 U.S.C. § 271(d)(3).

Likewise, DOJ observes that the limited extent to which competitive carriers in Kansas and Oklahoma have availed themselves of UNEs provides further evidence that “the prices of those UNEs are not appropriately based on cost.”<sup>28</sup> TELRIC-based costs should encourage competitive entry and the limited extent of such activity is a strong indication that SBC’s UNE rates may be unlawful. DOJ also states that because of the large difference between the interconnection and UNE prices in Oklahoma and Kansas compared to Texas “the Commission should undertake an independent determination whether the [prices in Oklahoma and Kansas] conform to the requirements of the 1996 Act and the Commission’s rules.”<sup>29</sup>

In addition, as noted in some of the initial comments, a large number of the rates in both Oklahoma and Kansas are interim rates.<sup>30</sup> For example, in Oklahoma the rates for certain UNEs and for the provisioning of collocation are not yet final even though the OCC proceeding has been ongoing for several years. The Oklahoma rates for xDSL loop conditioning are also interim. In Kansas, the state commission adopted arbitrated rates in Kansas for xDSL. Those rates are also interim and subject to modification and true up.<sup>31</sup> The Commission has stated that the existence of interim rates does not, in and of itself, mandate a rejection of a section 271

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<sup>28</sup> DOJ Evaluation at 2.

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> *See, e.g.*, Sprint Comments at 27.

<sup>31</sup> The Commission is currently conducting a proceeding in which many xDSL issues are being considered. The Cost studies for xDSL related UNEs are not even due at the Commission until December 15, 2000. The Commission is hopeful that it will be able to finalize the DSL Docket by the end of Spring 2001.

In Kansas the NRCs for UNEs have recently become permanent but at the filing of the instant application, the date from which the Commission must consider the application, those charges were still interim.

application.<sup>32</sup> But the Commission has also indicated that it fully understands the uncertainty for competitive carriers caused by the existence of interim rates and would address the existence of interim rates on a case by case basis. Where, as here, the number of interim rates is significant in both Oklahoma and Kansas and where it can hardly be said that the interim rates are for a “few isolated ancillary items” the Commission should find that there is not sufficient certainty to determine that the rates are TELRIC-based.<sup>33</sup> Therefore, the interim the rates presented in this application do not provide a basis for finding that SWBT has complied with TELRIC in either Oklahoma or Kansas.

Accordingly, in view of the inexplicably high UNE rates in Oklahoma and Kansas, there is no basis in the present record for concluding that SBC’s rates comply with TELRIC and the application should be denied on this ground alone. McLeodUSA and CapRock submit, in accord with the DOJ, that section 271 compels the Commission to make an independent assessment as to whether SBC’s rates are lawful cost-based. McLeodUSA and CapRock further submit that the Commission will be unable to do so based on the existing record because of the absence of cost information. Moreover, the Commission has no obligation to extend to SBC additional

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<sup>32</sup> In the *New York Order* the Commission stated that:

A BOC’s application for in-region interLATA authority should not be rejected solely because permanent rates may not have been established for each and every element or nonrecurring cost of provisioning an element . . . If the uncertainty causes by the use of interim rates can be minimized, then it may be appropriate, at least for the time being, to approve an application based on the interim rates contained in the relevant tariff.

*New York Order* at para. 258, 15 FCC Rcd at 4090.

<sup>33</sup> In New York, the Commission accepted interim rates for xDSL because the rate dispute was relatively recent, the New York Commission had a track record of setting other prices at TELRIC rates and because the rates were subject to true up. While the Commission accepted interim collocation rates in Texas, rates that clearly could have had an effect on an even greater number of competitors than the DSL rates in New York, the

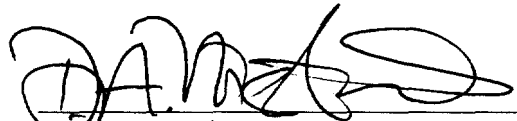


opportunities to adjust rates or otherwise correct the record concerning its high UNE rates in Oklahoma and Kansas. Because the application is deficient on its face, failing to demonstrate compliance with TELRIC as submitted, the Commission should promptly deny it.

## CONCLUSION

For the foregoing reasons, McLeodUSA and CapRock urge the Commission to deny SBC's Application for Provision of In-Region InterLATA Services in Oklahoma and Kansas.

Respectfully submitted,



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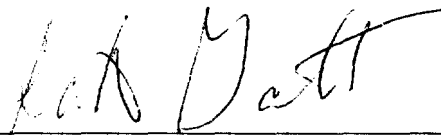
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Commission accepted the rates only after finding that the Texas Commission had made a good faith effort to set the interim rates at TELRIC.

## CERTIFICATE OF SERVICE

I, Sharon A. Gantt, hereby certify that the foregoing Reply Comments of McLeodUSA Telecommunications, Inc. and CapRock Communications Corp. were filed this 11th day of December 2000 and copies of same were sent via hand delivery and/or first class mail upon the following:



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